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In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The petition for a writ of certiorari presents the question whether the racially motivated refusal of the developer of a large residential subdivision to sell a house to Negroes contravenes federal law. In the view of the United States, the question is one of large public importance and merits this Court's review. We urge that the writ be granted.

1. The causes of the racial tensions which beset the Nation at the present time are many; but none, perhaps, is more fundamental than the situation in housing. Many Negroes are not only excluded from the experience of integrated living but are commonly denied decent living conditions, social services and educational and employment opportunities. One of the

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significant factors which has created, and tends to maintain, residential segregation is the widespread refusal of real estate developers to sell new suburban housing to Negroes.[1] Few issues tendered to this Court in recent years are more vital in their practical consequences than the legality of this practice.

2. The petitioners argue that the refusal to sell a house and lot to them in Paddock Woods constitutes a denial of equal protection of the laws within the meaning of Section 1 of the Fourteenth Amendment. To be sure, that provision is addressed to action by the State, not private individuals, and, nominally, no State official is implicated in the conduct of the developer here. But this Court has rejected a mechanical view of State action that would limit the protections of the Fourteenth Amendment to obvious exercises of governmental power. In *Marsh* v. *Alabama,* 326 U.S. 501, the Court held that the right of free speech extended to the privately owned streets of a company town. In *Shelley* v. *Kraemer,* 334 U.S. 1, it held that judicial enforcement of racially restrictive convenants violated the Fourteenth Amendment, since, as Mr. Justice Black explained in his dissenting opinion in *Bell* v. *Maryland,* 378 U.S. 226, 329, such covenants were "in reality the equivalent of and had the effect of state and municipal zoning laws, accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private con-

[1] We are advised that a significant proportion of new dwellings are being built in areas comparable to the developments involved here.

tracts, enforced by the State." And, just two Terms ago, in *Evans* v. *Newton,* 382 U.S. 296, the Court found sufficient indication of a public character in a private park in Macon, Georgia, to make the exclusion of Negroes from it unlawful State action.

These decisions—and others (*Terry* v. *Adams,* 345 U.S. 461; *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793; *Smith* v. *Allwright,* 321 U.S. 649)—establish the principle that a private individual who is permitted by the State to perform an essentially public function assumes, along with the governmental powers of the State, its constitutional obligations. We urge that the Court consider whether the facts of the present case bring it within the scope of this rule. According to the allegations of the complaint (which must be taken as true, since the case was dismissed at the pleading stage), the petitioners were refused on racial grounds the right to purchase a house and lot in a large real estate development otherwise open to the public. When completed, the development will house 1,000 people and form part of an even larger complex of similar developments constructed in the area by the same developer with financing by the Federal Housing Administration. This complex—which will house a total of some 2,700 families—will include recreational facilities (golf course plus tennis and bath club) built by the developer for the primary benefit of the residents. The developer has laid out streets for the use of the residents and has undertaken to provide such community services as garbage collection, all controlled by a board of trustees

appointed by him. The board will also have the legal authority to levy assessments and to collect them through judicial action.

Involved here, in short, is the creation of a complete suburban community. To fence out Negroes from such a community would appear to be essentially no different from fencing them out from a company town, a private park, or (by means of racial restrictive covenants) an already developed residential area.

3. Petitioners urge as an alternative basis for upholding the complaint—assuming the State is not sufficiently implicated to justify invoking the Equal Protection Clause itself—that this case falls within Section 1978 of the Revised Statutes, 42 U.S.C. 1982, which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." To be sure, literally read, the provision could be viewed as merely lifting the former total disability of slaves to acquire rights in real property, but that limited interpretation was rejected long ago. *Buchanan* v. *Warley,* 245 U.S. 60; *Harmon* v. *Tyler,* 273 U.S. 668; *Richmond* v. *Deans,* 281 U.S. 704; *Hurd* v. *Hodge,* 334 U.S. 24. Those cases hold expressly that any substantial "fencing out" of Negroes from an area is forbidden by Section 1978, and that is certainly the effect here.

The more difficult question here is whether the statute reaches wholly private action. We recognize that in *Corrigan* v. *Buckley,* 271 U.S. 323, the Court took the view that it did not. But that decision was

premised on the supposition that Section 1978 was Fourteenth Amendment legislation and that Congress lacked power to implement the Equal Protection Clause by controlling the conduct of private persons. It is arguable, however, that the provision—originally enacted in 1866 (Act of April 9, 1866, § 1, 14 Stat. 27) before the Fourteenth Amendment was adopted—permissibly implements the Thirteenth Amendment by removing a vestige of slavery. And, at all events, it may be appropriate to reconsider *Corrigan* in light of the prevailing view with respect to congressional power under the Fourteenth Amendment. We take it as now settled that a construction of Section 1978 as guaranteeing the enumerated rights against private abridgment would encounter no *constitutional* obstacle—even if the section were viewed as wholly Fourteenth Amendment legislation. See *United States* v. *Guest*, 383 U.S. 745, 761–762 (concurring opinion of Mr. Justice Clark), 774–784 (separate opinion of Mr. Justice Brennan); *Katzenbach* v. *Morgan*, 384 U.S. 641.

Nothing in the text of Section 1978 limits its reach to action by State officials.[2] Although other provisions

[2] In its original form, the provision ended with the phrase "any law, statute, ordinance, regulation or custom to the contrary, notwithstanding." Putting aside the *dictum* in the *Civil Rights Cases*, 109 U.S. 3, 16, we view these as words of emphasis, not of limitation—like the comparable words of the Supremacy Clause of the Constitution. U.S. Const., Art. VI, cl. 2. The sense of the provision, as we read it, is that equality of civil rights is guaranteed even as against hostile State enactments. But freedom to enjoy those rights free of racial discrimination is secured also where no State law compels or authorizes the interference, indeed, even where State law prohibits it. Cf.

of the Act in terms dealt only with conduct taken "under color" of State law (*e.g.*, § 2, now 18 U.S.C. 242), it is arguable that the more sweeping outlawry of discriminations based on race invoked here was not similarly confined. That would not be inconsistent with other civil rights legislation of the period.[3] Moreover, one need not judge the matter entirely from the limited viewpoint of 1866. Because the central preoccupation of that time was to combat classical State action in the form of the Black Codes,[4] it was natural for the Congress to focus its remedy on those who would enforce or invoke those hostile laws. The reenactment of the statute in 1870,[5] in changed circumstances, may well have had a broader objective. At that point the Nation was concerned with unofficial action and it is reasonable to suppose

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Monroe v. *Pape*, 365 U.S. 167. This reading is, of course, consistent with the Revision of 1874 which deleted the quoted phrase, presumably as surplusage. See R.S. § 1978.

[3] Thus, while Sections 2 and 3 of the Enforcement Act of May 31, 1870 (16 Stat. 140) reached only officers, Section 4 (invalidated in *United States* v. *Reese*, 92 U.S. 214), Section 5 (invalidated in *James* v. *Bowman*, 190 U.S. 127), and Section 6 (now 18 U.S.C. 241), reached private conspiracies as well. So it is with the Ku Klux Act of April 20, 1871 (17 Stat. 13): Section 1 (now 42 U.S.C. 1983) reached only acts done "under color" of State law, but Section 2 (the criminal portion of which was declared unconstitutional in *United States* v. *Harris*, 106 U.S. 629, and *Baldwin* v. *Franks*, 120 U.S. 678, the civil provision surviving as 42 U.S.C. 1985) encompassed private conspiracies. And the pattern is the same in the Act of March 1, 1875 (18 Stat. 335): Sections 1 and 2 (invalidated in the *Civil Rights Cases*, 109 U.S. 3) reached private action, while Section 4 (sustained in *Ex Parte Virginia*, 100 U.S. 339, now 18 U.S.C. 243) reached only officials.

[4] Even then, however, there were occasional indications of a broader concern. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., Part 2, 1120, 1124, 1160.

[5] Act of May 31, 1870, § 18, 16 Stat. 140, 144.

that the Congress which dealt most explicitly with private conspiracies (see 18 U.S.C. 241) likewise intended to reach unofficial interference with the rights guaranteed by the provision here at issue.[6] The later reenactment in the Revisions of 1874 and 1878 appear to point in the same direction.[7] Thus, there may be sound basis for arguing that Section 1978 forbids private action which, in practical effect, frustrates the right of the Negro to live in the community of his choice.

In conclusion, we stress that this case does not involve the validity of a single, isolated refusal to sell to a Negro when comparable housing in the same area is readily available to him. Such an individual act of dis-

[6] Indeed, the decision in *Hodges* v. *United States*, 203 U.S. 1, seems to so assume with respect to the rights guaranteed by Section 1977, the companion provision also derived from Section 1 of the Act of 1866. The holding that Congress cannot constitutionally reach an unofficial conspiracy interfering with the exercise of the right to contract has been qualified by recent decisions. See, also, the *dictum* of Mr. Justice Bradley, on circuit, in *United States* v. *Cruikshank*, 1 Woods 308, 319, 25 Fed. Cas. 707, 712, in which he apparently construes Section 1978, together with 18 U.S.C. 241, as protecting the right of a Negro to lease a farm against the interference of a wholly private conspiracy of hostile whites.

[7] Between 1870 and 1878, Congress had twice more addressed itself to private action interfering with the exercise of federal rights. See § 2 of the Ku Klux Act of April 20, 1871, and §§ 1 and 2 of the Act of March 1, 1875, both discussed at n. 3, *supra*. It is also noteworthy that the Revised Statutes expanded the practical scope of both of the other surviving provisions of the Civil Rights Act of 1866—Section 2, the criminal provision, reenacted as R.S. § 5510 (now 18 U.S.C. 242); and Section 3, the removal provision, re-enacted as R.S. 641 (now 28 U.S.C. 1443). See *Screws* v. *United States*, 325 U.S. 91, 98–100, 120; *Georgia* v. *Rachel*, 384 U.S. 780, 788–789. Cf. *United States* v. *Mosley*, 238 U.S. 383, 386–388.

crimination may well be beyond the reach of the Equal Protection Clause and of Section 1978. The only issue here is whether a discriminatory course of conduct which has the effect of wholly excluding Negroes from an entire community is not so substantial an abridgment of the right to acquire property as to offend the statute or so like an exercise of governmental power as to fall under the ban of the Constitution. In our view, the question is substantial and merits this Court's consideration.

Respectfully submitted.

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